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No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH PANTOJA, JERRY MEYER, CHRIS PEDERSEN,

Petitioners,

vs.

ALL-AMERICAN TRANSPORT, INC., AMERICAN FREIGHT SYSTEM, INC., TERMINAL TRANSPORT COMPANY, INC., MID-CONTINENT FREIGHT LINES, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 705,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a union member must exhaust internal union remedies as a precondition to filing an action under § 301 of the Labor-Management Relations Act where, although the collective bargaining agreement includes no deadline for the filing of grievances, the permanent joint arbitration committee created by that agreement asserts the power to dismiss a grievance on the extra-contractual grounds of laches.

2. Whether, in determining whether a transfer of corporate ownership takes place between independent or related companies for purposes of selecting the appropriate seniority provisions of a collective bargaining agreement, the ultimate purpose of nominally independent corporations to join under a common roof can be considered.

PARTIES

The parties to this action are all named in the caption.

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OPINIONS BELOW

There are no official or unofficial reports of any orders or opinions below. The unpublished orders of the Court of Appeals (*Joseph Pantoja et al.* v. *All-American Transport System, et al.*, Nos. 81-1206, 81-1238, consolidated) and of the District Court (*Joseph Pantoja, et al.* v. *All-American Transport System, et al.*, No. 77 C 3859, D.C. N.D.Ill.) are attached as appendices to this petition.

JURISDICTION OF THE SUPREME COURT

The decision of the Court of Appeals was rendered on September 1, 1982 by unpublished order pursuant to Seventh Circuit Rule 35, and appears as an appendix to this petition. No rehearing or extension of time in which to file this petition for certiorari has been sought.

Jurisdiction lies to the Supreme Court pursuant to 28 U.S.C. 1254(1)

STATUTES INVOLVED

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy, or without regard to the citizenship of the parties.
>
> Labor-Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a)

STATEMENT OF THE CASE

(a) Procedural History

Petitioners, members of defendant Local 705, International Brotherhood of Teamsters (Union) filed suit in October, 1977 in the District Court for the Northern District of Illinois seeking relief under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, against the four corporate respondents (Employers) for violation of the seniority provisions of a collective bargaining agreement, and against the Union for violation of its duty of fair representation. (A. 1)* Motions of

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* Citations "A" are to the appendix filed in the Court of Appeals. Citations "R" are to the record on appeal. Citations "App." are to the appendix of this petition.

all respondents for summary judgment were initially denied (A. 88, 129), but shortly before trial the District Court considered and allowed the Union's renewed and revised motion for summary judgment based upon Petitioner's alleged failure to exhaust available internal union remedies. The case proceeded to bench trial against the Employers only, and on January 19, 1981, the Court found in favor of the Employers. (A. 226, 237) The oral findings and conclusions of the District Court (A. 227 et seq.) appear in the appendix to this petition. (App. 9a)

Petitioners brought a timely appeal before the Court of Appeals for the Seventh Circuit challenging both the summary judgment in favor of the Union and the judgment after trial in favor of the Employers. On September 1, 1982, the Court of Appeals, by unpublished order, affirmed the entire judgment of the District Court. The order of the Court of Appeals is likewise appended to this petition. (App. 17a)

(b) Petitioners v. The Union

The Petitioners were all truck drivers employed by Respondent Mid-Continent Freight Lines, Inc. The most senior Petitioner (Pantoja) was hired by Mid-Continent in 1955, the most junior (Pedersen) in 1975. (A. 5) Petitioners were also all members of the Union, Local 705 of the International Brotherhood of Teamsters, which acted as their collective bargaining representative. (A. 2)

During the entire period material to this case, there was in effect between the Union and Chicago-area trucking operators (including the local Employers in this case) an area-wide collective bargaining agreement, the Joint Area Cartage Agreement, generally referred to as JACA. Mid-Continent and All-American were signatories to this

agreement. (A. 2) One section of the JACA was devoted to the seniority consequences of transfers of employer ownership, through what the JACA categorized as "buy-out," "merger with wholly-owned subsidiary," and "consolidation."* Briefly summarized, in the event of a "buy-out" the drivers of the acquired employer were end-tailed, or placed at the bottom of the seniority list of the acquiring employer. In the event of a "consolidation" or "merger with wholly owned subsidiary," however, the seniority lists were sandwiched one-for-one, beginning with the most senior driver. Other sections of the JACA set forth grievance procedures.**

Members of the Union were also subject to provisions of the International Constitution of the International Brotherhood of Teamsters, etc. Portions of that Constitution addressed internal remedies which were, the District Court found, available to and mandatory upon aggrieved members of the IBT as a precondition for filing any legal actions against the Union.***

In June of 1977, Petitioner's employer, Respondent Mid-Continent, came under the control of Respondent All-American, itself a newly acquired subsidiary of Texas Gas Transmission Corporation (A. 60 et seq.) Mid-Continent ceased to exist as a corporate entity.+

The Union determined that the change in ownership at Mid-Continent should be treated for seniority purposes as a "buy-out," rather than as a "consolidation" or

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* Set forth in full in the appendix to this petition.

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+ See "Petitioners v. The Employers," *infra.*, p. 5 et. seq. of this petition.

"merger with wholly-owned subsidiary." All-American followed the decision of the Union. As a result, Petitioners were rendered the most junior drivers at All-American.

Petitioners filed a written grievance with the Union, urging that the determination of their seniority under the "buy-out" provision was erroneous and that in fact a consolidation or merger of employers had taken place. The Union refused to process the grievance, finding it to be without merit.

Petitioners then filed their § 301 action in the District Court without any further endeavour to act through the Union or to employ any internal union remedies to review the initial adverse decision on their grievance. Although no issue was raised on this point during the early stages of the case, the Union's second motion for summary judgment (A. 148) was based upon Petitioners' failure to exhaust these remedies, and the District Court awarded summary judgment in favor of the Union on that basis. (A. 216, 218)

The District Court entered its ruling prior to this Court's decision in *Clayton* v. *U.A.W.*, 451 U.S. 679, which was decided while Petitioners' appeal was pending. The Court of Appeals determined that under the *Clayton* standard the ruling of the District Court was correct, and it affirmed the order of summary judgment in favor of the Union.

(c) Petitioners v. the Employers

The District Court denied summary judgment to the Employers, (A. 88, 89, 104) and the case went to bench trial against them. After trial, the District Court found

in favor of all Employers, and made oral findings and conclusions which are set out in the appendix to this petition. (App. 9a)

The transfer of ownership which cost Petitioners their seniority was one of a number of corporate transactions which occurred between June of 1976 and June of 1977. Evidence regarding these transactions was introduced before the District Court and will be briefly summarized here.

In June of 1976, All-American, Inc., a trucking subsidiary of Respondent All-American Transport, applied to the Interstate Commerce Commission for authority to acquire Respondent Mid-Continent. Permission was denied that October. (R. 19, 298) All-American, Inc. was then purchased by Texas Gas Transmission Corporation through its holding company, Respondent American Freight System, Inc. (R. 111, 301) At the same time, All-American, Inc., now a Texas Gas-American Freight System subsidiary, purchased Mid-Continent. (App. 3, R. 111) All-American survived the transaction as a corporate entity and Mid-Continent did not. On reapplication to the Interstate Commerce Commission, All-American received temporary authority for the transaction, and in November of 1976 Mid-Continent employees were placed on a separate seniority list pursuant to the JACA provisions for acquisitions upon I.C.C. temporary permits. (R. 270, 271, 300)

American Freight System was organized before the temporary permit for acquisition of Mid-Continent was sought. (R. 231-216, 309). After American Freight Sys-

tem was organized, the following arrangements and transactions took place:

6/76 Texas Gas made plans for American Freight System to manage All-American and another subsidiary, Terminal Transport, to become effective 4/78. (R. 117-119, 313-316, 323-326);

9/8/76 American Freight System authorized and approved the acquisition of Mid-Continent by All-American. (R. 311-312);

9/8/76 Texas Gas consented to a preliminary agreement for the merger of All-American, Inc. and All-American Transport. (R. 325);

9/8/76 All-American, Inc. agreed to acquire control of Mid-Continent. (R. 313-315, 318, 323);

9/20/76 All-American, Inc. applied to the I.C.C. for permission to acquire Mid-Continent. (R. 19, 129, 298-299);

10/10/76 Texas Gas and American Commercial Lines assumed control of All-American Transport and All-American, Inc. with operations in other cities to be integrated during 12/76. (R. 212-223, 278-279);

11/76 Mid-Continent and Terminal Transport dovetailed their seniority lists in Milwaukee. (R. 46-47, 213-216, 278-279);

11/19/76 The I.C.C. authorized All-American, Inc.'s temporary control of Mid-Continent. (R. 76, 299-300);

11/22/76 Texas Gas and American Commercial Lines obtained temporary authority for control of All-American Transport. (R. 110-111, 149);

12/1/76 All-American, Inc., assumed control over the operations of Mid-Continent pursuant to I.C.C. temporary authority. (R. 15, 22, 24);

2/10/77 All-American, Inc. submitted a second application to the I.C.C. for acquisition of Mid-Continent. American Commercial Lines and Texas Gas replaced All-American Transport in control of All-American, Inc. (R. 145, 315, 316, 321);

2/10/77 American Commercial Lines and Texas Gas assumed control of All-American, Inc.;

3/29/77 I.C.C. hearing was held on the applications for acquisition of Mid-Continent filed by 9/20/76. (A. 60-66);

3/29/77 American Commercial Lines now controlled All-American, Inc. and All-American Transport.;

4/21/77 The I.C.C. granted approval to the acquisition of Mid-Continent by All-American, Inc. (A. 60-66);

6/77 All-American's acquisition of Mid-Continent was consummated with final closing held in 8/77. (R. 302-303).

While All-American operated Mid-Continent under I.C.C. temporary authority, Petitioners were maintained on a separate seniority list from All-American's drivers. (R. 15, 24, 77, 145-146, 267) In June of 1977, however, with the consummation of All-American's acquisition of Mid-Continent, Petitioners were "end-tailed," i.e., added to All-American's seniority list and placed at the very bottom behind every All-American driver of whatever length of service. (R. 38) It is this "end-tail" which was the subject of Petitioners' unsuccessful grievance to the Union.

At trial, Petitioners urged that the series of interlocking corporate transactions among trucking firms and

holding companies had as their purpose the elimination of employees' seniority rights, with consequent economic benefits to the employers. The District Court found that no such intention or plan had been established. (A. 227-236)

In its findings of fact and conclusions of law (set forth in full as part of the appendix to this petition) the District Court made the following observations:

> "It is my conclusion, from the evidence, that when All-American acquired Mid-Continent it was an independent, unique corporate transaction, which constituted a buy-out; and that, under the terms of the contract, under which the plaintiffs had worked, the consequence of that buy-out was that the Mid-Continent employees . . . found themselves at the bottom of the seniority list of All-American Transport drivers. . . .
>
> The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet, unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers. . . .
>
> [P]laintiffs' contention that this reveals that, at the time of the original All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive the plaintiffs of their rights is not supported by . . . any . . . evidence in the case. Whether or not this was a long-range play may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet transaction — the buy-out of Mid-Continent by All-American." (A. 230-234)

The District Court accordingly found in favor of the Employers on the merits and denied Petitioners relief. (App. 237)

On timely appeal, the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court.

BASIS OF FEDERAL JURISDICTION BELOW

Jurisdiction to the federal courts lies under 29 U.S.C. § 185(a).

REASONS FOR ALLOWING THE WRIT

I.

THE COURT OF APPEALS MISAPPLIED THIS COURT'S RECENT DECISION IN CLAYTON v. U.A.W. IN REQUIRING PETITIONERS TO EXHAUST INTERNAL UNION REMEDIES AS A CONDITION PRECEDENT TO FILING AN ACTION UNDER § 301 OF THE LABOR-MANAGEMENT RELATIONS ACT WHERE, IN LIGHT OF THE NON-CONTRACTUAL PRACTICE OF THE JOINT GRIEVANCE ARBITRATION COMMITTEE OF APPLYING THE DOCTRINE OF LACHES TO GRIEVANCES WHICH IT CONSIDERS STALE, THE ABSENCE OF A CONTRACTUAL GRIEVANCE DEADLINE CANNOT GUARANTEE THAT INTERNAL UNION REMEDIES CAN REINSTATE PETITIONERS' GRIEVANCE.

It is by now well established that an employee who hopes to maintain a suit against his employer or his union under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) for violation of a collective bargaining agreement bears an obligation to first exhaust any exclusive grievance and arbitration procedures available to him under that collective bargaining agreement, *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 13 L. Ed.2d 580, 85 S. Ct. 614 (1965), *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 47 L. Ed.2d 231, 96 S. Ct. 1048 (1976), *Vaca* v. *Sipes,* 386 U.S. 171, 17 L. Ed.2d 842, 87 S. Ct. 903 (1967). More recently, this Court has turned its attention to the related question of whether such an employee is also obligated to exhaust internal union procedures before bringing an action under § 301, *Clayton* v. *United Auto Workers,* 451 U.S. 679, 68 L. Ed.2d 538, 101 S. Ct. 2088 (1981).

Clayton established a test of at least three factors to be applied in determining whether, in a given case, exhaustion of internal union remedies is a condition precedent to a suit under § 301. The Court there held:

> As we stated in NLRB v. Marine Workers, supra, 391 U.S. at 426 . . . , courts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedure would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.
>
> *Clayton* v. *United Auto Workers*, 451 U.S. at ....., 68 L. Ed. 2d at 548-49, 101 S. Ct. at 2095.

No claim has been raised that either the first or the third *Clayton* factor is applicable in this case. Attention has been concentrated instead on the second factor, which is itself bifurcated. Under this factor the employee must exhaust the remedies available within the union if these remedies can either:

> 1) afford him whatever relief he is actually seeking through the courts in his § 301 suit;
>
> or
>
> 2) reactivate his grievance.

Again, attention in this case is devoted to only one aspect of this test. It has not been asserted by anyone that the internal remedies available to Petitioners were adequate to afford them the same relief they sought under § 301. Instead, Respondents argued, and the courts below held, that the absence a deadline for the filing of grievances distinguished this case from *Clayton* and assured that internal union remedies would be sufficient to reactivate Petitioners' grievance. As a result, the Court of Appeals affirmed the District Court's award of summary judgment in favor of Respondent Union.

The Court of Appeals was wrong in distinguishing *Clayton* on this basis, and in ruling that the mere absence of a strict contractual grievance deadline in the collective bargaining agreement is sufficient to support a determination that an internal appeal through the union is adequate to reinstate the grievance. On the contrary, it is the established practice under the Joint Area Collective Bargaining Agreement, as established by at least one reported decision of the National Labor Relations Board, *Kesner,* 209 N.L.R.B. 294 (1974), that the Joint Grievance Committee established by the JACA asserts and may exercise the non-contractual power to dismiss a grievance for laches. Thus, in *Kesner,* the N.L.R.B. noted that:

> "One of the several bases for dismissal of the A. Kesner grievance . . . was that it was not timely filed. The joint cartage agreement does not impose a flat contract deadline on the filing of grievances. The joint grievance committee here interposed a limitation analogous to laches. . . . On this basis alone, and quite apart from the merits, the 12-man board acted well within the limits of ordinary fairness in disposing of the A. Kesner matter."
> *A. Kesner,* 209 N.L.R.B. 294 at 306, n. 23.

This case is, therefore, unlike *Clayton* in that the limitation on the power of the union to reinstate the grievance is to be found outside the face of the collective bargaining agreement. Yet the Court of Appeals, in a conclusion inconsistent with the purpose of *Clayton*, has implied that a restriction on the right of reinstatement which is not to be found within the bargaining agreement may be disregarded in applying the *Clayton* factors.*

It is, of course, by no means clear whether the Joint Grievance Committee would apply a non-contractual deadline and dismiss a grievance which had been delayed while making its way through union appeals. A sense of fairness would lead one to hope not. On the other hand, a sense of fairness would also lead one to expect that where the collective bargaining agreement does not provide a deadline for the filing of grievances, then the joint arbitration committee would not create one *ex post facto*. *Kesner*, however, makes it clear that the JACA is subject to an unwritten gloss, part of which is an unknown deadline for the filing of grievences.

This Court should grant certiorari in order to make it clear that where, by reason of such a non-contractual practice, the union cannot guarantee that the exhaustion of internal union remedies will not run a grievant afoul of an unknown, unwritten, deadline, then the grievant cannot be compelled to pursue those internal remedies as a precondition to seeking judicial relief under § 301.

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* The *laches* rule applied in *A. Kesner* was not addressed in the opinion of the Court of Appeals, and it is not clear from the briefs whether that Court was aware of *Kesner*.

II.

THE ULTIMATE INTENTION OF A GROUP OF NOMINALLY INDEPENDENT CORPORATIONS TO MERGE UNDER A SINGLE ROOF IS MATERIAL IN DETERMINING WHETHER THOSE SENIORITY PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT GOVERNING INDEPENDENT OR THOSE GOVERNING INTER-RELATED TRANSFERS SHOULD APPLY.

Petitioners' case against the Employers depends upon a question of law: namely, which of several seniority provisions was to govern their seniority status as drivers for Respondent All-American after All-American acquired their former employer, Mid-Continent. Under the "buy-out" clause of the JACA, petitioners are essentially treated as new employees of the purchasing employer, and drop to the bottom of the new seniority list. For example, Petitioner Pantoja, with over twenty years of seniority at Mid-Continent, lost his entire seniority accumulation because All-American elected to treat the acquisition as a "buy-out." Under "consolidation" or "merger with wholly owned subsidiary" seniority provisions of the JACA, Petitioners would have received much more favorable treatment, their "names being sandwiched in, one-for-one, starting with the most senior Employee in each company," JACA, Art. 8, sec. 7(c) (See Appendix to this petition; App. 1a - 2a).

The District Court and the Court of Appeals rejected Petitioners' arguments that the wrong seniority clause had been applied. In so deciding, both courts made the erroneous determination that if Petitioners failed to establish a deliberate intention on the part of the Employers to cheat them out of their seniority rights, then

the background of multiple corporate transactions against which the All-American/Mid-Continent transfer occurred was immaterial in deciding the appropriate seniority provision.

Petitioners had urged, in essence, that the acquisition of Mid-Continent by All-American was only one of a large number of transactions whereby Texas Gas Transport Corporation expanded its holdings into midwestern trucking operations by gaining control of various subsidiary corporations which, in turn, acquired still further subsidiaries of their own, creating a multi-strand corporate chain. It was part of this overall plan for All-American, a new Texas Gas subsidiary, to acquire Mid-Continent. Thus, Petitioners argue, in light of the grand Texas Gas net already cast over the nominally independent Mid-Continent, Mid-Continent's acquisition by All-American was not truly the buy-out of one independent company by another but was rather a merger or consolidation of two companies which were, in fact if not yet in form, both Texas Gas subsidiaries. Accordingly, Petitioners took the position that either the "consolidation" or "merger" seniority provisions, which called for sandwich, rather than the "buy-out" provision calling for end-tail, should have been applied.

It was part of Petitioners' argument that the motive for the complexities of the corporate transactions was a conscious desire to save costs by creating an apparent "buy-out" that would eliminate their seniority rights. The District Court, in its findings of fact, specifically determined that the evidence had failed to support this theory. (A. 234, and Appendix to this petition, App. 9a et seq.).

Yet rejection of Petitioners' theory of motive does not compel rejection of their underlying argument. The District Court most certainly made no finding of fact disputing Petitioners' evidence of a pre-planned series of transfers and acquisitions. It made instead a conclusion of law that even if such a pre-planned series existed, it was immaterial to the selection of an appropriate seniority provision.

The essential statement of the District Court reads:

> "The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet, unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers. .
>
> Plaintiffs' contention that this reveals that, at the time of the original All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive plaintiffs of their rights is not supported by . . . any . . . evidence in the case.
>
> Whether or not this was a long-range play may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet transaction—the buy-out of Mid-Continent by All-American." (A. 230-234, App. 9a et seq.)

It is with the finding, "whether or not this was a long-range play may or may not be true; but it isn't relevant," that Petitioners disagree. This is a specific conclusion of law that the form of a corporate acquisition is more important than the substance in construing the rights of innocent third parties injured by the transaction. The law should not require such a result.

Certiorari should be allowed so that this court may establish a clear rule that, at least insofar as the rights of third parties are concerned, the ultimate plans and intentions of merging corporate conglomerates are relevant and material in construing contracts which depend for their interpretation on the status of the contracting corporation.

CONCLUSION

Wherefore, Petitioners respectfully ask that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

Contract Provisions

I. Excerpts from the Joint Area Cartage Agreement.

ARTICLE 8

Seniority

Buy-outs, Mergers and Consolidations Section 7. (a) Buy-outs:

(1) When operations of bought-out company are continued as a separate entity:
In the event an Employer buys out the business or operations of another Employer and operates it as a separate entity, then the seniority of the retained Employees shall continue as before.

(2) When operations of bought-out company are merged with operations of the buyer:
In the event an Employer buys out another Employer and merges the operations of the bought-out Employer into his own, those Employees of the bought-out Employer who are employed by the acquiring Employer will begin to accrue seniority with their new Employer at the beginning of such employment, and if two or more are employed on the same date their preference over each other shall be determined by their former seniority standing with the bought-out Employer. Employees in laid off status with recall rights shall be offered reemployment before Employees of the bought-out Employer are employed. A merger of Employers preceded or followed by the surviving corporation purchasing stock of the other Employer or exchanging its stock for that of the other Employer shall be treated as a buy-out by the surviving Employer for purposes of seniority.

(3) When Interstate Commerce Commission temporary authority is granted to control and merge:
Where an Employer only has temporary authority or approval to operate another company, then separate seniority lists shall continue in effect until final authority is granted and consummated. The company which is to survive will assume the obligations of both Collective Bargaining Agreements during the period of temporary authority or control.

(b) Merger with wholly-owned subsidiary:

Whenever an Employer organizes a wholly-owned subsidiary and later merges such subsidiary into itself as the survivor, then the seniority standing of the Employees of both companies shall be determined the same as in cases of consolidations after the operations of both companies are combined.

(c) Consolidations:

When the operations of two or more Employers are consolidated into a new business concern, the seniority standing of the Employees employed by the new business concern shall be determined by the names being sandwiched in, one-for-one, starting with the most senior Employee in each company.

ARTICLE 19

Grievance Procedure

Grievances Other Than Discipline or Discharge

Section 2. All differences relating to the interpretation or application of any provision of this Agreement, other than discharge or discipline of an Employee, shall be processed as follows:

(a) The Employer and the Union having jurisdiction over the Employee shall within five (5) working days

after notice of the grievance meet as a grievance committee and reach a settlement which shall be final and binding.

(b) If the parties fail to reach a settlement within the aforesaid time, then the matter shall be submitted to a permanent Joint Grievance Committee composed of six (6) Employer representatives designated by the following: Cartage Exchange of Chicago, Illinois Motor Truck Operators Association, Illinois Trucking Associations, Inc., Indiana Truckers Association (Calumet Chapter), Northern Illinois Truckers Association and Motor Carrier Labor Advisory Council, and six (6) Union representatives. The Joint Grievance Committee shall meet at a mutually convenient time and place on such regular or special basis as it shall determine, and shall render its decision or award within three (3) days after close of the hearing. If the Joint Grievance Committee resolves the dispute by a majority vote of those present and voting, then such decision shall be final and binding upon the Union, Employer, and Employee. If the Joint Grievance Committee is deadlocked on the disposition of the dispute then either party shall be entitled to all lawful economic recourse to support its position in the matter. The Joint Grievance Committee may adopt such rules of procedure as it determines necessary in its sole discretion, and shall have the power to require the production from the Employer of all books and records, including payroll and time sheets, necessary to a complete disposition of the dispute and to make a complete and final disposition of all matters before it including, but not limited to, a money award for violation of the wage, hour, overtime provisions or health and welfare or pension contributions, including costs and attorney's fees. Pending a disposition of the dispute by the Joint Grievance Committee, there shall be no strike or lock-out, except as hereinafter set forth, provided, however, 'that nothing herein shall authorize the Joint Grievance Committee to alter the terms and conditions of this Agreement or to make a new agreement.

II. Excerpts from the International Constitution of the International Brotherhood of Teamsters, etc.

Trials and Appeals of Local Unions, Other Subordinate Bodies and Elective International Union Officers

Section 3 (a). Whenever charges are preferred against a Local Union or against a Joint Council, or other subordinate body, such charges shall be filed in writing in duplicate with the Secretary of the trial body, and shall be served personally or by registered or certified mail on the Secretary-Treasurer of the Local Union or the Joint Council or other subordinate body so charged. If the charges are against the Local Union the trial shall be by the Executive Board of the Joint Council; provided that if a Local Union is not affiliated with a Joint Council due to the fact that no Joint Council exists with which such Local Union can affiliate, the trial shall be by the General Executive Board. If the charges are against a Joint Council or other subordinate body, the trial shall be before the General Executive Board. The provisions of this Section shall also be applicable when the Executive Board of the subordinate body is charged or is the charging party.

(b). A Local Union shall be accorded thirty (30) days time in which to appear for trial and submit its defense. In the case of a Joint Council or other subordinate body the time of trial shall be fixed by the General Executive Board.

(c). Appeals from decisions on charges against Local Unions or Local Union Executive Boards shall be taken to the General Executive Board and from it to the Convention. Appeals from decisions on charges against Joint Councils or other subordinate bodies shall be taken to the Convention by only the Joint Council or other subordinate body involved. In all other respects the procerure on appeals shall be the same as provided in Section 2.

(d). Trial of elective International Union officers shall be only before the General Executive Board at such time and place as fixed by the General Executive Board. The officer charged shall be found guilty only on a two-thirds (⅔) vote of the entire General Executive Board. Appeals by such general officers from decisions of the General Executive Board shall be to the Convention. Charges against elective officers of the International Union or any subordinate body shall be limited only to those activities or actions occurring during their current term of office, and only those activities and actions occurring prior to their current term which were not then known generally by the membership of the International Union or the subordinate body in the case of an officer of a subordinate body.

(e). Emergency powers provided for in Section 10 of this Article shall apply with the same force and effect to Local Union and Joint Councils and other subordinate bodies.

Decisions and Penalties

Section 9 (a). Decisions and penalties imposed upon individual members, officers, elected Business Agents, Local Unions, Joint Councils or other subordinate bodies found guilty of charges may consist of reprimands, fines, suspensions, expulsions, revocations, denial to hold any office permanently or for a fixed period or commands to do or perform, or refrain from doing or performing, specified acts. If the penalty is by way of fine, then the same must be paid pending an appeal, if one is taken, unless the General President upon request waives payment pending appeal. A Local Union ordered to reinstate a member or perform an act other than the payment of a fine must comply therewith as a condition precedent to taking an appeal unless the General President or the General Executive Board suspends such order pending the appeal. If the fine is against a member or officer of a Local Union, assessed by the Local Union, it shall be paid into the treasury of the Local Union. If a fine is

assessed against a Local Union by a Joint Council, the payment shall be to the treasury of the Joint Council.

(b). If the fine is assessed when the General Executive Board has assumed original jurisdiction, it shall be paid to the treasury of the International Union.

(c) When such penalty consists only of a fine and an appeal is taken, such fine shall be deposited as above provided; thereupon such member, elected Business Agent, officer, Local Union, Joint Council or other subordinate body shall be permitted to continue in the Local Union with full rights and privileges in accordance with the laws of the International Union. If on appeal the decision is reversed and the fine disallowed, then the same shall be returned to the party depositing the same. Whenever a decision is handed down by any trial or appellate body and an appeal is taken, such decision shall stand and remain in full force and effect until reversed by a higher body unless the General President upon request stays the effectiveness of the decision pending appeal.

(d) In the event of non-compliance with the decision handed down by a trial or appellate body, the member, elected Business Agent, officer, Local Union, Joint Council or other subordinate body shall stand suspended from all rights and privileges under this Constitution until the provisions of the decision have been complied with, unless the General President has waived payment of a fine or stayed the effectiveness of the decision pending appeal. If, however, the decision carries with it an order of expulsion, then such order of expulsion shall immediately take effect, unless the General President has stayed the effectiveness of the decision pending appeal.

(e) Any expelled member may be subsequently reinstated to membership in the Local Union front which expelled, or permitted membership in another Local Union, only by the action of the General Executive Board.

(f) Any member or Local Union that is tried by the General Executive Board cannot be tried for the same offense by a Local Union or Joint Council.

(g) The General Executive Board may send a case back to the Joint Council, the Local Union, or other hearing body or officer for further hearing, production of additional testimony, or for further consideration with or without such further hearing.

Exhaustion of Remedies

Section 12 (a) Every member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered or who claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any court, tribunal or agency against the International Union, any subordinate body or any officer or employee thereof.

(b) Where a member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body, before or following exhaustion of all remedies provided for within the International Union, resorts to a court of law and loses his or its cause therein, all costs and expenses incurred by the International Union may be assessed against such individual, Local Union, Joint Council or other subordinate body, in the nature of a fine, subject to all penalties applicable where fines remain unpaid.

Where such court action is by an individual or by a Local Union, Joint Council or other subordinate body against a Local Union, Joint Council or other subordinate body, the foregoing provision in respect to the payment of costs and expenses shall be applicable in favor of the Local Union, Joint Council or other subordinate body proceeded against in court.

(c) The appeals procedure provided herein is also available to and must be followed by any member who is aggrieved by any decision, ruling, opinion or action of the Local Union, membership, officers or Executive Board, excluding collective bargaining matters.

Section 13. All decisions following trials or hearings should be made and rendered within sixty (60) days of the date the hearing or trial commenced, unless otherwise ordered by the General Executive Board. This time requirement shall not be mandatory but is only directory.

APPENDIX "B"

Rulings of the District Court

I. Summary Judgment in favor of the Union.

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 77 C 3859
Date 1/9/81

JOSEPH PANTOJA, et al.,

vs.

ALL-AMERICAN TRANSPORT, INC., et al.,

Pursuant to memorandum opinion and order entered this day, the motion of the International Brotherhood of Teamsters, etc., Local 705, for reconsideration of this court's earlier denial of summary judgment, and for summary judgment, is granted.—DRAFT

II. Findings of Fact and Conclusions of Law given orally after trial.

The Court: Gentlemen, I think the circumstances justify my delivering findings of facts and conclusions of law from the bench. I have hastily scribbled notes, as you gentlemen argued and during the trial; I hope to utilize them.

I apologize, in advance, for the fact that this will not be the polished literary masterpiece that I might have produced, had I a week to work on it; but I think you

are entitled to a decision, and an early decision. I feel prepared to give it and, therefore, I intend these comments to be the findings of fact and conclusions of law, which the rules require of me in a non-jury case.

It is obvious that, in terms of the conclusions of law, that I do have jurisdiction of the matter; that I have heard adequate evidence concerning the issues in the case; and that I am in an adequate position to decide it; and that the factual determinations, I am about to comment on, are the findings that I need give you.

By way of preliminary comment, corporate mergers, buy-outs, business failures, retrenchments, the various business adjustments—either to the dictates of the economy or their own plans for progression of the maximization of profits—produce layoffs and demotions. This hardship—this type of hardship—and it is, obviously, a hardship for those persons affected—is frequent on the corporate scene. And it is the understandable progenitor of emotional reactions, resentments and anger. And an individual who, after some long and devoted service to a corporation, finds that his employer has been sold to somebody else, and he is at the bottom of a seniority list and no longer recognized as a long and faithful employee, that individual has an understandable emotional and angry reaction. And, in a sense, that individual is a victim of the soulless corporate system; which is exactly what it is, since corporations have no souls, and operating within the law, they are entitled to operate, if they remain within the law, motivated solely by the maximizations of their profit.

At the outset, it occurred to me that this case seemed to present a simple legal issue—one almost ripe for summary judgment—the simple issue of whether the original transaction, whereby All-American bought Mid-Continent, was a buy-out and, if so, what were the contractual consequences of that.

The defense, however, had a—for want of a better word, I might call a conspiracy theory; a conspiracy to the effect that what seemed plain and apparent, in terms of buy-out, in the application of the contract, was really, as Mr. Intini argued, a substitution of form for substance and a part of a plot, in effect—using that in its least perjorative sense—to achieve a result as part of a total long-term corporate maneuver or series of maneuvers, which interfered with the rights of the plaintiffs.

Indulging that theory—or the possibility that that theory might be demonstrated, I gave the plaintiff's a great deal of latitude in presenting their case and developing any aspect of that theory that they thought was appropriate.

The plaintiffs, of course, have demonstrated a steady erosion of their position, their employee status, through a corporate buy-out and, subsequently, a corporate merger which, at the end, found them having dropped from the top of the seniority list of a small company to the lowest ten percent of the seniority list of a much larger company after one buy-out and one consolidation or one merger.

Whatever the dispute they had with the union, the plaintiffs' rights, obviously, flow from the contract which binds the employer here and which creates such rights as the plaintiffs have in the interpretation of that contract and the contract agreement with Local 705, operative in this geographic area. And I emphasize that to indicate that nothing that happened in Milwaukee, or anywhere else, has any bearing on this case. We are concerned with companies here, employees here and the contract here.

It is my conclusion, from the evidence, that when All-American Transport acquired Mid-Continent it was an independent, unique corporate transaction, which constituted a buy-out; and that, under the terms of the

contract, under which the plaintiffs here worked, the consequence of that buy-out was that the Mid-Continent employees—the eleven of them—found themselves at the bottom of the seniority list of All-American Transport drivers.

There has been much evidence concerning later All-American and Terminal Transport consolidation, because the drivers are, understandably, concerned by and angered by the fact that in that transaction that instead of the lists being assembled—the seniority lists being assembled with one group of employees on top and one group on the bottom, they were "sandwiched"—to use the word that has come about here. If, of course, in the original transaction, the Mid-Continent drivers had been sandwiched, the eleven would have found themselves in a much more desirable seniority position. And it is their contention and their argument that the second transaction shows the way for the first transaction and that it should have been handled in the same way.

That argument falls in face of the fact, however, that the second transaction—the All-American-Terminal Transport transaction—was not a buy-out, but a consolidation or merger; and that, in accordance with the provisions of the contract with Local 705, the consequences were different; and the sandwiching was the consequence there. The dropping to the bottom of the list was the appropriate consequence in the first transaction.

In fact, the second transaction—and in order to make clear what I am talking about, I am referring, of course, to the All-American-Terminal Transport consolidation—is really not germane to this case, because, having heard the evidence and having concluded that this was a consolidation and having concluded that the seniority lists were rightly sandwiched, we are entitled to set it aside as a situation with a different consequence, because of the different facts and different applications of different sections of the contract. And the end result of

hearing all the evidence on that is the inevitible conclusion that it does not help us in deciding the case before the .....

Union people testified—called by the plaintiff—the union took the position I have described; that is, that the first transaction was a buy-out, that the seniority lists were properly handled, when the Mid-Continent drivers went to the bottom of the list, and that the second transaction was a consolidation and that the seniority lists were properly merged in this case.

Actually the union has been dismissed from this case, but it have have well remained in this case, because I heard all the evidence that the union would have produced, I assume, in the person of Mr. Carmel, the union counsel and the business agent who just testified.

The union's position was right. The union conducted itself, in the circumstances, correctly and appropriately applied the contract and made the correct decisions and gave the employees—the plaintiffs here—the members—the plaintiff employees—all the representation they were entitled to, both in terms of its conclusions as to their rights and in the handling of their grievances.

So, as I said, the fact that the union was dismissed from the case becomes a somewhat unusual circumstance, because I have heard enough evidence that if the union were in the case, I would have ruled for them.

The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet, unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers.

So, the plaintiff argue that what actually happened to the drivers was not the inevitible result or what happened to the plaintiffs was the result of a pre-planned

conspiracy to eliminate them by creating forms of transactions which concealed the true substance of the transactions.

Of course, the other side of that argument is that what actually happened to the plaintiffs was the inevitible fall-out of this series of corporate maneuvers and, if the maneuvers were legal and appropriate in the first place, the fact that they were pre-planned is inconsequential.

Defendants' Exhibit 5—the September 8th memo of closing—reveals the complex corporate maneuvers and the role of Texas Gas in, if not orchestrating these maneuvers, at least approving all of them. Part of the complicated closing, revealed in that memorandum, is in response to the intricate Interstate Commerce Commission regulatory system; part of it reflects a furtherance of long-range corporate plans, no doubt influenced by Texas Gas. But the plaintiffs' contention that this reveals that, at the time of the original All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive the plaintiffs of their rights is not supported by that document, or by any other evidence in the case.

Whether or not this was a long-range play may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet transaction—the buy-out of Mid-Continent by All-America.

The fact that a resulting corporation, one year later—the resulting corporation, one year later merged, whether pre-planned or not, doesn't claim the character of the original All-American buy-out of Mid-Continent and, at the time of that guy-out, the rights of the plaintiffs arose under the 705 contract. 705 properly interpreted the contract, the employer properly interpreted the contract, and the decision that took the Mid-Continent drivers to the bottom of the new All-American list was a decision in accordance with the contract.

I don't have to decide, fortunately, whether this is fair. This is an agreement the plaintiffs drove under and worked under; and it is the agreement that establishes the rights and binds them.

When the plaintiffs filed this lawsuit and when they filed their grievances, they argued that they were retaliated against by their employers. This issue is not really squarely before me, because I am being asked to determine what rights they had under the contract at 705; and I have determined that. But, because I admitted evidence concerning this claimed retaliation, I feel that I should comment on it.

I have no doubt that, in the realm of human affairs, there is some resentment against—by an employer against an employee who is filing grievances and lawsuits, especially if the employer feels that he is justified and that the employee is wrong. But what was really happening to the plaintiffs in this case is that they were being treated as "ten-percenters"—and the sad fact is that that is exactly what they were—and what was happening to them was that their former seniority was, unfortunately, gone and they were not enjoying the benefit of that seniority and, thus, felt that they were being discriminated against and the subject of unfair treatment. And, while that felling is understandable, it has no legal consequences in this decision.

Therefore, my conclusion is that the plaintiffs have not proved their case. I deny the plaintiffs' prayer for the relief sought in the complaint and find for the defendants. And that will be the judgment of the Court.

I guess that concludes it.

We will recess at this time.

(Which were all the proceedings had in the foregoing cause this day and date.)

III. Judgment in favor of the Employers after trial.

UNITED STATES DISTRICT COURT

For The

Northern District Of Illinois, Eastern Division

JOSEPH PANTOJA, et al.

vs.

ALL-AMERICAN TRANSPORT, INC., et al.

Civil Action File No. 77 C 3859

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Frank J. McGarr, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiffs take nothing and that the action be dismissed on the merits.

Dated at Chicago, Illinois, this 14th day January, 1981.

/s/ Stuart Cunningham

APPENDIX "C"

Order of the Court of Appeals.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: June 1, 1982

September 1, 1982

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

Nos. 81-1206
81-1238

JOSEPH PANTOJA, et al.,

Plaintiffs-Appellants,

vs.

ALL-AMERICAN TRANSPORT, INC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-3859

FRANK J. MCGARR, *Judge.*

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* The Honorable Robert A. Grant, Senior District of the Northern District of Indiana, is sitting by designation.

ORDER

Plaintiffs, all members of Teamsters Union, Local 705 (the "Union"), filed this suit under section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1976), alleging that their employers (various trucking companies) breached their collective bargaining agreement by denying them contractual seniority rights. Plaintiffs also allege that the Union breached its duty of fair representation in failing to process a grievance on the seniority issue. The district court granted the Union summary judgment on the ground that plaintiffs failed to exhaust internal union remedies before instituting suit against the union. After a bench trial, the district court concluded that the employers did not breach the collective bargaining agreement when plaintiffs were placed at the bottom of a seniority list after their former employer was purchased by another firm. We affirm the judgments in favor of the Union and the employers.

The breach of contract alleged by plaintiffs arose from a series of transactions in which their former employer, Mid-Continent Freight Lines, Inc. ("Mid-Continent") was purchased by All-American, Inc. ("All-American"). In September, 1976, All-American submitted an application to the Interstate Commerce Commission ("ICC") to acquire Mid-Continent. Although the application was initially denied, the ICC granted All-American's temporary control application in November, 1976, and All-American subsequently assumed control of Mid-Continent's operations. Pursuant to article 8, section 7(a)(3) of the Joint Area Cartage Agreement (the "JACA") between the Union and both All-American and Mid-Continent, All-American retained separate seniority lists for the employee of each company during the period All-American exercised temporary control over Mid-Continent under the ICC order. In June, 1977, the ICC approved the purchase of Mid-Continent by All-American and granted All-American's permanent control application. All-American then completed its purchase of Mid-Continent, and Mid-Con-

tinent's operations were fully integrated into All-American. It is undisputed that Mid-Continent, as an entity, did not survive this transaction.

Shortly after the ICC approved All-American's purchase of Mid-Continent, the Union requested from its counsel an opinion on the seniority rights of the former Mid-Continent employees now employed by All-American. Counsel informed the Union that, under section 7(a)(2) of the JACA, the acquisition of Mid-Continent constitued a "buy-out" in which the operations of the purchased company were merged into those of the purchasing company. In such circumstances, section 7(a)(2) of the JACA dictates that the former employees of Mid-Continent who continue employment with the new employer, All-American, must be placed at the botton of All-American's seniority list.[1]

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[1] Article 8, section 7 of the JACA sets out in detail the seniority consequences of various corporate transaction as follows:

Buy-outs, Mergers and Consolidations

Section 7. (a) Buy-outs:

(1) When operations of bought-out company are continued as a separate entity:
In the event an Employer buys out the business or operations of another Employer and operates it as a separate entity, then the seniority of the retained Employees shall continue as before.

(2) When operations of bought-out company are merged with operations of the buyer:
In the event an Employer buys out another Employer and merges the operations of the bought-out Employer into his own, those Employees of the bought-out Employer who are employed by the acquiring Employer will begin to accrue seniority with their new Employer at the beginning of such employment, and if two or more are employed on the same date their preference over each other shall be determined by their former seniority standing with the bought-out seniority Employer. Employees in laid-off status with recall rights shall

The Union forwarded this opinion to All-American, and All-American followed this interpretation of the collective bargaining agreement. Plaintiffs in this action, as former Mid-Continent employees, then filed a grievance petition with the Union. The Union did not process the grievance but rather informed plaintiffs at a meeting with All-American and former Mid-Continent drivers that in view of the opinion of its counsel and the provisions of the collective bargaining agreement, the grievance was without merit.

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[1] (Continued)

be offered re-employment before Employees of the bought-out Employer are employed. A merger of Employers preceded or followed by the surviving corporation purchasing stock of the other Employer or exchanging its stock for that of the other Employer shall be treated as a buy-out by the surviving Employer for the purposes of seniority.

(3) When Interstate Commerce Commission temporary authority is granted to control the merger:
Where an Employer only has temporary authority or approval to operate another company, then separate seniority lists shall continue in effect until final authority is granted and consummated. The company which is to survive will assume the obligations of both Collective Bargaining Agreements during the period of temporary authority or control.

(b) Merger with wholly-owned subsidiary:
Whenever an Employer organizes a wholly-owned subsidiary and later merges such subsidiary into itself as the survivor, then the seniority standing of the Employees of both companies shall be determined the same as in cases of consolidations after the operations of both companies are combined.

(c) Consolidations:
When the operations of two or more Employers are consolidated into a new business concern, the seniority standing of the Employees employed by the new business concern shall be determined by the names being sandwiched in, one-for-one, starting with the most senior Employee in each company.

During the period All-American operated Mid-Continent under the ICC-approved temporary application, ownership of All-American also changed hands. All-American was a subsidiary of a holding company known as All-American Transport, Inc., ("Transport"). At about the same time All-American filed its application with the ICC to acquire Mid-Continent, Texas Gas Transmission Corp. ("Texas Gas"), through its subsidiary American Commercial Lines ("Commercial"), filed an application with the ICC to acquire Transport. Texas Gas, which already owned another trucking firm, Terminal Transport, Inc., ("Terminal Transport") sought to acquire Transport as part of its plan to diversify in the field of interstate motor carriers. The ICC approved Texas Gas' acquisition of Transport before the ICC granted final approval to All-American to acquire Mid-Continent. Because of the confusing similarity between the names Terminal Transport and All-American Transport, Texas Gas renamed its new acquisition American Freight System, Inc. ("AFS"). Thus, when the acquisition of Mid-Continent by All-American was approved by the ICC, the parent company of All-American had been purchased and renamed AFS by Texas Gas.

Shortly *after* the ICC approved All-American's acquisition of Mid-Continent in June, 1977, Texas Gas placed both of its motor carriers—All-American and Terminal Transport—under the new AFS holding company, continuing, however, to maintain the separate identities and operations of each carrier. In September, 1977, Texas Gas determined, for various financial and personnel reasons, that it would consolidate the motor carrier operations of All-American and Terminal Transport into a *new* entity. This new entity was also called American Freight System, Inc., *but this name was subsequently changed to ACT* Companies, Inc. The ICC approved the consolidation of All-American and Terminal Transport into ACT Companies, Inc.

For purposes of seniority, the seniority lists of All-American and Terminal Transport were "dove-tailed" or "sandwiched" as provided in section 7(c) of the JACA upon the consolidation of these two subsidiaries into the new company, ACT Companies. Section 7(c) provides that "[w]hen the operations of two or more Employers are consolidated into a new business concern," a new seniority roster is devised by "sandwich[ing] in, one-for-one, starting with the most senior Employee in each company." *See, infra,* note 1. No employees, including plaintiffs, filed a grievance over this interpretation of the collective bargaining agreement, and the Union apparently also approved this interpretation. Plaintiffs' claim, however, that because of their placement at the bottom of All-American's seniority roster when All-American bought Mid-Continent, they were necessarily dovetailed into the seniority roster of the *new ACT Companies, Inc.,* at or near the bottom, thereby further perpetuating the previous error with respect to All-American's list. Moreover, plaintiffs assert that the complicated corporate transactions which resulted in the "buy-out" of Mid-Continent and the "consolidation" between All-American and Terminal Transport are merely subterfuges to cover up the real motive of the employers and Union—to deny these plaintiffs their rightful seniority.

II.

The district court granted the Union summary judgment on January 9, 1981. The court's decision was based on our then recent opinion in *Tinsley* v. *United Parcel Service, Inc.,* 635 F.2d 1288 (7th Cir. 1980) (*Tinsley I*), which held that the failure to exhaust mandatory internal union remedies would bar a suit by an employee against his union for breach of the duty of fair representation, provided that exhaustion of those remedies was not futile. The Supreme Court subsequently vacated out decision in *Tinsley I,* 452 U.S. 934 (1981), in light of the Court's recent decision in *Clayton* v. *UAW,* 451 U.S. 679 (1981). Plaintiffs argue on appeal that *Clayton* mandates that we

reverse the grant of summary judgment below. We disagree.

In *Clayton*, the Supreme Court reaffirmed the principles we recognized in *Tinsley I* that exhaustion of mandatory internal union appeal procedures is consistent with the national labor policy, which favors nonjudicial resolution of employment contract disputes. *See Tinsley* v. *United Parcel Service, Inc.*, 665 F.2d 778, 789 (7th Cir. 1981) (*Tinsley, II*). Exhaustion of remedies is not, however, required in every case since the "courts have discretion to decide whether to require exhaustion." *Clayton*, 451 U.S. at 689. To guide this exercise of discretion, the *Clayton* Court noted that if "the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks," then a court could "properly excuse the employee's failure to exhaust." 451 U.S. at 689.[2]

We do not believe that we should exercise our discretion here to excuse plaintiffs' failure to exhaust their internal union remedies. These procedures are mandatory for every Union decision,[3] and this court has previously

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[2] The Court also mentioned two other factors that might excuse a failure to exhaust: inability to obtain a fair hearing because of the hostility of union officials, and unreasonable delay of a judicial hearing if exhaustion is required. *Clayton*, 451 U.S. at 689. Plaintiffs in the instant case have neither asserted that their failure to exhaust is excused by either of these two factors nor cited to us any evidence to indicate that a requirement of exhaustion here would be futile or unfair.

[3] We agree with the district court that Article XIX, § 12(a) of the Teamsters' International Union Constitution, which provides, *inter alia*, that "[e]very member . . . who claims to be aggrieved" by a union decision must exhaust all internal remedies, mandates exhaustion by plaintiffs in this case. *See* Order of Jan. 9, 1981, at 2-4. Although section 12(a) may seem more clearly applicable to instances in which a member challenges union

recognized the general adequacy of these same remedies. *See Tinsley I*, 635 F.2d at 1290. Moreover, although the Union may not be able to award plaintiffs the relief they seek (*i.e.*, credit with All-American for the seniority they earned as employees of Mid-Continent), it is undisputed here that the union internal appeals procedure could reactivate the grievance since the collective *bargaining agreement contains no time limit within* which this grievance must be presented to the employer.[4] Thus, by fol-

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[3] (Continued)

discipline imposed upon him, the broad language of this provision makes it applicable to any grievance arising from a union decision which affects a member. Our conclusion in this respect is not altered by section 12(c), *which exempts "collective bargaining" matters from the* exhaustion of appeal procedures under section 12(a). Even if the present controversy between plaintiffs and the Union falls within the cryptic and ill-defined category of "collective bargaining," the exemption provision would exempt planitiffs from utilizing the *appeals* procedure but not from *initially* filing a complaint with the union before instituting the lawsuit.

[4] This factor distinguishes the instant case from *Clayton*. In *Clayton*, the Court held that exhaustion could not be required as a prerequisite to suit there because the internal union remedies could *neither* grant plaintiff the relief he sought *nor* reactivate the grievance since a request for arbitration was time-barred under the contract. 451 U.S. at 691. The *Clayton* Court did not require that *both* of these possible outcomes be achievable as prerequisites to exhaustion, since *each* is designed to provide plaintiffs potentially with the relief they seek from their employer. The internal union remedies are entirely adequate where, as here, the reactivation of the grievance with the employer could result from the invocation of these remedies. *See Miller* v. *General Motors Corp.*, ... F.2d ..... (No. 81-1812 7th Cir. Apr. 9, 1982); *cf. Tinsley II*, 665 F.2d at 780 (union remedies could provide *plaintiff directly with relief sought; hence,* exhaustion of internal union remedies required).

lowing the internal union appeals procedure, plaintiffs could potentially, without the need for court intervention, obtain a reversal of the Union's decision not to process a grievance. This is precisely the purpose of requiring exhaustion as recognizing by the *Clayton* Court. *See Miller* v. *General Motors Corp.*, ... F.2d ..... (No. 81-1821 7th Cir. Apr. 9, 1982).

Plaintiffs' ostensibly most persuasive argument against applying the exhaustion principles of *Clayton* is that *Clayton* mandates exhaustion of internal union remedies only for "*internal* Union matters such as those involving the interpretation and application of a union constitution." 451 U.S. at 688 (emphasis in original). But this argument seems to be premised upon plaintiffs' quoting of the above statement out of its context. Justice Brennan, writing for the majority in *Clayton*, did not intend to limit the exhaustion principles he recognized only to cases involving internal union matters. Rather, he made the above quoted statement in the context of discussing the appropriate *rationale* for requiring employees to exhaust, intra-union remedies. In this regard, Justice Brennan concluded that the "policy of forestalling judicial interference with internal union affairs," rooted in section 101(a)(4) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(4) (1976), was not a rationale) applicable to the case before him because this policy was applied only in cases involving internal union disputes, and the case before him (like the case before us) did not *concern internal union matters*. 451 U.S. at 688-89 & n.13.[5]

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[5] Section 101(a)(4) of the Landrum-Griffin Act prohibits unions from limiting the right of union members to institute court suits, with the exception that before the member may sue the union or an officer of the union, the member must exhaust internal union hearing procedures. This provision is set out in what is commonly referred to as the labor union member's "bill of rights," and the courts have limited the exhaustion requirement imposed by Section 101(a)(4) to such internal union matters as are affected by the bill of rights. *See NLRB* v. *Marine Workers*, 391 U.S. 418 (1968).

The appropriate rationale to justify exhaustion, according to Justice Brennan, was "that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over collective-bargaining agreements." 451 U.S. at 689; *see Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). And in applying this rationale, Justice Brennan concluded that the Court could not impose a mandatory, universal exhaustion requirement but rather, as we note here, judicial discretion must govern the application of the requirement for exhaustion of intra-union remedies. We therefore reject plaintiffs' reading of *Clayton*, which would limit the exhaustion requirement to grievances involving internal union affairs, as contrary to the Supreme Court's clear intention to further a discretionary application of the exhaustion principle. Therefore, the order of the district court granting the Union summary judgment for plaintiff's failure to exhaust intra-union remedies is affirmed.[6]

III.

At the close of a three-day bench trial, the district court ruled that plaintiffs had not proven their case against the various employers who are defendants in this action. The court concluded that All-American's acqui-

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[6] Because summray judgment is proper on this ground, we need not address plaintiffs' claims that there are issues of fact concerning the Union's alleged breach of the duty of fair representation. Plaintiffs apparently argue that we ought still to address those grounds because the district court considered the union's breach of the duty of fair representation on the merits when ruling from the bench after a trial on the question of the alleged breach of contract by the employers. To the extent the district court considered the merits of the breach of fair representation question, these were, as will be explained in section III, *infra*, germane only to the employer's liability under section 301(a) of the LMRA and had no effect on the grant of summary judgment in favor of the union for failure to exhaust internal union remedies.

sition of Mid-Continent was an independent transaction constituting a "buy-out" with merger of the operations of the bought-out company, which, under the JACA, permitted All-American to place plaintiffs at the bottom of its seniority list. Tr. at 377. The subsequent integration of *All-American and Terminal Transport into the new entity, ACT* Companies was, according to the district court, a consolidation" or merger," which required the "sandwiching" of both companies' seniority lists under the JACA. Tr. at 378. Thus, the court concluded that the employers did not breach provisions of the collective bargaining agreement pertaining to seniority rights. Moreover, the court also concluded that the union "correctly and appropriately applied the contract . . . and gave the employees . . . all the representation they were entitled to . . . ." Tr. at 379.

It is now axiomatic that when the collective bargaining agreement vests in the union exclusive authority to process grievances, employees cannot sue employers under section 301(a) of the LMRA for an alleged breach of the agreement unless they first establish that their union breached its duty of fair representation in pursuing the grievance. *Vaca* v. *Sipes,* 386 U.S. 171, 185-86 (1967). The union breaches its duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca,* 386 U.S. at 190; *accord Hoffman* v. *Lonza,* 658 F.2d 519, 524 (7th Cir. 1981) (Cudahy J., concurring). Thus, if the employer asserts as a defense in a section 301(a) action the employee's failure *to exhaust all stages of a* grievance procedure established in a collective bargaining agreement, a reviewing court must first decide whether the union breached its duty of fair representation before determining if the employer violated the contract.

In the instant case, it is evident, because the Union initially decided not to process plaintiffs' claim as a grievance, that the plaintiffs did not exhaust the grievance procedure *set out in the JACA*. It is unclear, how-

ever, whether the defendants here are *relying* on this failure to exhaust contract grievance procedures as a defense in this action. If these employers *are* relying on such a failure we would be required to determine in the first instance whether the Union breached its duty of fair representation in refusing to process plaintiffs' grievance. Although defendants do not address the question in their appellate brief, the court below was apparently aware of an exhaustion defense since it discussed in its ruling from the bench the question whether the Union's conduct in these matters amounted to a breach of the duty of fair representation. Moreover, the plaintiffs' allegations of a conspiracy between the Union and the employers is generally consistent with a claim that the Union's refusal to process a grievance constitued a breach of the fair representation duty. *See, e.g., NLRB* v. *David Buttrick Co.*, 361 F.2d 300 (1st Cir. 1966); *Kirkland* v. *Arkansas-Best Freight System, Inc.*, 475 F. Supp. 180 (E.D. Ark. 1978), *aff'd in part, rev'd in part on other grounds*, 629 F.2d 538 (8th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). Hence, we will consider as a threshhold question whether the Union breached its duty of fair representation when it refused to process the plaintiffs' grievance, but we will also examine whether the district court correctly concluded, as an independent matter, that the employers did not violate plaintiffs' seniority rights under the JACA.

We have no difficulty in agreeing with the district court that the Union provided these plaintiffs with fair representation. This is not a case where the union has failed to investigate the grievance of decided not to pursue the grievance for an arbitrary reason. Rather, the Union requested its counsel to review the sale of Mid-Continent to All-American, and the Union then abided by the opinion of its counsel that All-American had "bought-out" Mid-Continent within the meaning of section 7(a)(1) of the JACA. The impact of this opinion was, as the district court recognized, unfavorable to these plaintiffs since

they lost seniority previously earned with Mid-Continent. But an unfavorable union decision, taken in good faith and without arbitrariness, is not enough to breach the duty of fair representation. *Cf. Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973) (mere fact that one group of employees was worse off than another group after seniority lists were integrated does not show breach of fair representation absent bad faith on part of union). Moreover, plaintiffs did not persuade the district court, nor have they persuaded us, that the Union's interpretation of the contract was inconsistent with past practice or impermissibly tainted by animosity between Union leaders and these plaintiffs. *See Rupe* v. *Spector Freight Systems, Inc.*, ... F.2d ..... (Nos. 81-1490 & 81-1590 7th Cir. May 28, 1982). In sum, we cannot find that the Union's handling of plaintiffs' grievance breached the duty of fair representation.

The district court also determined, on the merits of the question, that the defendants did not breach the collective bargaining contract. Again we agree with the court's determination. As a preliminary matter, the district court found that the transaction in which All-American acquired Mid-Continent was distinct from the later corporate transaction in which Texas, having acquired All-American, eventually consolidated All-American and Terminal Transport. The court thus rejected plaintiffs' claim that these various corporate transactions were part of a scheme designed to interfere with the plaintiffs' seniority rights. We do not find that the district court's factual determinations with respect to this matter are clearly erroneous.

With the elimination of their unsupported conspiracy claims, plaintiffs can produce little to challenge the employers' application of the contract. All-American's acquisition of Mid-Continent was clearly a "buy-out" with merger of the operations of the bought-out company, as contemplated under section 7(a)(2) of the JACA. It is undisputed that all of Mid-Continent's assets were trans-

ferred to All-American, that Mid-Continent's trucking operations were fully integrated into All-American's operations and that Mid-Continent did not survive the sale as a corporate entity. We believe that this transaction could not have been anything but a "buy-out" as that term is commonly used. Moreover, the subsequent transaction orchestrated by Texas Gas, combining All-American and Terminal Transport under the control of a third corporation was not a buy-out but was rather a "consolidation." Two previously *separate corporate entities,* which operated independently but which were owned by the same corporation, were consolidated into a new corporation, AFS (*later* renamed ACT Companies, Inc.), so that the operations of the subsidiaries were fully integrated under the ownership and control of the pre-existing parent corporation. This transaction is quite different from All-American's purchase of Mid-Continent in that both corporations, All-American and Terminal Transport, were in the first instance subsidiaries of the *same* corporation and they were integrated into a *new* corporation; in the Mid-Continent/All-American transaction, on the other hand, both corporations were owned by different parent corporations, and no new corporate entity was created but rather one company (All-American) was the sole survivor of the transaction. Thus, the employers properly applied section 7(c) of the JACA to the All-American/Terminal Transport transaction by sandwiching or dovetailing the seniority lists of All-American and Terminal Transport.

IV.

The grant of summary judgment in favor of the Union is affirmed. The order dismissing on the merits the plaintiffs' action against the employer defendants is affirmed.

AFFIRMED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-885

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

JOSEPH PANTOJA, JERRY MEYER, CHRIS PEDERSEN,
Petitioners,

vs.

ALL-AMERICAN TRANSPORT, INC.,
AMERICAN FREIGHT SYSTEM, INC.,
TERMINAL TRANSPORT COMPANY, INC.,
MID-CONTINENT FREIGHT LINES, INC.,
AND
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND
HELPERS OF AMERICA, LOCAL 705,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the lower courts err in concluding that: (1) the union fulfilled its duty of fair representation; (2) the employers did not breach the collective bargaining agreement by concurring with the union's interpretation of the seniority provisions concerning placement of certain employees on the seniority list; and (3) the employees failed to exhaust the intra-union remedies available to them prior to filing suit?

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vs.

ALL-AMERICAN TRANSPORT, INC., AMERICAN FREIGHT SYSTEM, INC., TERMINAL TRANSPORT COMPANY, INC., MID-CONTINENT FREIGHT LINES, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, LOCAL 705,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTION

Because of the interrelationship, on the one hand, of the Respondent Union's duty of fair representation, and, on the other, the compliance by all Respondents with the applicable provisions of the collective bargaining agreement governing the seniority replacement of Petitioners, Respondents submit a Joint Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

COUNTERSTATEMENT OF THE CASE

The seniority placement of the Petitioners ("employees") had been governed by a master collective bargaining agreement existing at relevant times between the Respondent Union ("Local 705") and certain employers, among them the Respondent Employers ("employers"). The employees, formerly employed by Mid-Continent Freight Lines, Inc., had their relative seniority determined by the parties' application of the contract's seniority provisions to the nature of the transaction involving the purchase by All-American, Inc. of Mid-Continent Freight Lines, Inc.; the sole transaction about which the employees have complained.

Because the employees were dissatisfied with their seniority placement, they filed a grievance following the All-American/Mid-Continent corporate transactions. The grievance was referred by Local 705 to its counsel for an opinion concerning application of the facts within Local 705's knowledge to the seniority provisions of the master collective bargaining agreement relating to buy-outs, mergers, and consolidations between or among employers signator to the agreement. Counsel reviewed the ICC and corporate documents and advised Local 705 that this transaction constituted a "buy-out" under Article 8, Section 7(a)(2) of the collective bargaining agreement, thus the employees' seniority rights began to accrue at the time the new entity was formed (App.C,p.28a). Local 705 and the employer concurred in the opinion and the employees were so advised. The employees then sued Local 705 for unfair representation and the employers for breach of contract. The district court granted Local 705's motion for summary judgment based on the employees' failure to exhaust their internal union remedies. The case against the employers went to trial on the merits.

At the trial of the employees' claims against the corporate defendants, the district court heard and read all of the evidence concerning Local 705's processing of the grievance (App.B,p.13a). In entering a judgment on the merits for the employer, the district court necessarily determined that Local 705 had not breached its duty of fair representation (App.B,p.13a; App.C,pp.27a-27b).

The court of appeals agreed: "We have no difficulty in agreeing with the district court that the Union provided these plaintiffs

with fair representation" (App.C.,p.28a). Accordingly, the court of appeals affirmed (1) the district court's order of summary judgment in favor of Local 705 on the ground that the employees had failed to exhaust intra-union remedies, and (2) the judgment on the merits for the employer in part on the ground that Local 705 had not breached its duty of fair representation.

Finally, although the employees have not advised this Court, the judgment in favor of Local 705 rests on the alternative finding below that Local 705 had not unfairly represented the employees. As a result of this finding, review of the exhaustion issues tendered by the employees is not warranted.

SUMMARY OF ARGUMENT

The employees do not challenge in this Court the lower courts' findings that Local 705 fulfilled its duty of fair representation. Accordingly, this Court's reversal on the issue of exhaustion of intra-union remedies presented by the employees will have no effect upon the district court's disposition on the merits of the claim of unfair representation.

Moreover, the employees' arguments presented to this Court that exhaustion of intra-union remedies should not be required under the circumstances of this case were not presented to the courts below, nor were facts adduced in support of these contentions. Therefore, this Court should not consider them.

The lower courts' application of the doctrine of exhaustion of internal union remedies is consistent with this Court's holding in *Clayton v Auto Workers Union*, 451 US 679 (1981); the lower courts are in harmony with the *Clayton* principles; and no important federal questions are presented for review.

Concerning the employers, the evidence of record in the lower court showed that despite the claim of the employees that the employers conspired to adversely affect their seniority, the All-American/Mid-Continent transaction was separate and discrete, and the disposition of relative seniority among all affected employees comported with the "buy-out" provisions of the collective bargaining agreement. Both the district court and the court of appeals did consider whether there existed an ultimate purpose of the independent corporations to join at a later date, and upon the facts, found contrary to the contentions and allegations of the employees. In short, that which the employees seek to have this Court consider has been considered by both of the lower courts.

ARGUMENT.

I.

THE EMPLOYEES' FAILURE TO CHALLENGE THE COURT OF APPEALS' ALTERNATIVE HOLDING IN FAVOR OF LOCAL 705 ON THE MERITS WARRANTS DENIAL OF THE PETITION.

It is by now well-established that in order to recover against either an employer or a union in an action brought pursuant to Section 301 of the Labor-Management Relations Act of 1947, 29 USC §185, the employee must establish both that the union breached its duty of fair representation, and that the employer breached the collective bargaining agreement. *See, e.g., United Parcel Service, Inc. v Mitchell*, 451 US 56,62 (1981); *Hines v Anchor Motor Freight, Inc.*, 424 US 554,570-71 (1976). The courts below concluded on the merits that Local 705 fulfilled its duty of fair representation, and the employees do not challenge this conclusion in this Court. Accordingly, the judgment in favor of Local 705 would not be disturbed even if this Court reversed the courts below on the only issue upon which the employees seek review as to Local 705.

II.
THE EMPLOYEES' FAILURE TO RAISE IN THE LOWER COURTS THE FACTUAL ISSUE PRESENTED IN THEIR PETITION, AND THE ABSENCE OF RECORD EVIDENCE UPON WHICH THEIR ARGUMENT IS BASED, PREVENT THEM FROM RAISING IT IN THIS COURT.

This district court's order of summary judgment in favor of Local 705 due to the employees' failure to exhaust their internal union remedies available to them preceded this Court's opinion in *Clayton v Auto Workers Union*, 451 US 679 (1981). *Clayton* issued, however, prior to the filing of the briefs in the court of appeals, and both the employees and Local 705 addressed the application to this case of the *Clayton* test that exhaustion is ordinarily a pre-requisite to the institution of a suit for unfair representation where the intra-union remedies may result in the reactivation of the grievance within the contractual dispute mechanism. Specifically, Local 705 urged, and the court of appeals found (App.C.,pp.24a-25a), that because the contractual grievance procedure contained no time limitations for the processing of non-disciplinary grievances, the employees' grievance could have been reinstated within the grievance machinery following intra-union proceedings (App.C.pp.24a-25a).

The employees urge in this Court the possibility that the joint grievance committee—the employer-union panel empowered to finally resolve disputes under the collective bargaining agreement—might have applied the doctrine of laches to bar reinstatement of the grievance had the internal union forum ordered Local 705 to process the grievance. This contention was neither raised to nor addressed by either of the lower courts nor is it supported by any evidence in the record. This Court ordinarily will not address issues which were neither presented to nor passed upon by the court of appeals. *See, e.g., U.S. v Mendenhall*, 446 US 544,551 n.5 (1981); *Adickes v Kress & Co.*, 398 US 144,147 n.2 (1970). This is particularly true where, as here, the issue is one of fact upon which no evidentiary record has been developed in the district court. *Jenkins v Anderson*, 447 US 231,234 n.4 (1980); *cf. Mendenhall, supra.*

III.

THE JUDGMENT BELOW FOLLOWS THE PRINCIPLES OF *CLAYTON*; THE LOWER COURTS HAVE NOT EXPRESSED DIVERGENT VIEWS ON THIS ISSUE; AND NO IMPORTANT FEDERAL QUESTIONS ARE PRESENTED FOR REVIEW.

Clayton established that exhaustion of internal union remedies is ordinarily[1] a prerequisite to an employee's lawsuit against a union contending a violation of the duty of fair representation where the internal union remedies may either: (1) afford the employee the complete relief that is being sought judicially, or (2) result in the reactivation of the employee's grievance within the grievance procedure of the collective bargaining agreement. 451 US at 685.

The court of appeals applied the second prong of the *Clayton* test after finding that the collective bargaining agreement contained no time limitations for the processing of the grievance at issue herein. Accordingly, had the employees invoked the internal appeals and been successful, there was no contractual barrier to both Local 705 and the employer submitting the merits of the employees' claims to the joint grievance committee for its determination. (App.C,pp.24a-25a).

The court below previously applied the second prong of the *Clayton* test. *Miller v General Motors*, 675 F2d 146 (7th Cir 1982.) In *Miller*, the court of appeals required exhaustion of internal union remedies where the collective barganing agreement specifically provided for the revival of grievances following the intra-union review proceedings. *Id.* at 147-48. To our knowledge no other reported decisions have expressly dealth with this prong of the Clayton test. Moreover, inasmuch as the court of appeals simply applied the clear test set forth in *Clayton*, there is no important federal question present for the Court's consideration. Accordingly, there is no occasion for this Court to now consider this issue.

[1] *Clayton* also conditioned exhaustion upon other considerations, *viz.*, whether the hostility of the union officials would prevent a fair hearing, and whether the internal review procedures would unreasonably delay the employee's opportunity for judicial determination of the merits of his claims. 451 US at 689. The employees expressly acknowledge that neither of these considerations is present here (Pet. at 12).

IV.
THE MATTERS WHICH THE EMPLOYEES URGE THE COURT TO CONSIDER WERE CONSIDERED BY THE COURTS BELOW, AND THE EMPLOYEES' CONTENTIONS WERE PROPERLY REJECTED ON THE BASIS OF THE EVIDENCE.

With respect to the question presented for review regarding the employers it is abundantly clear from the employees' arguments that matters warranting the attention of this Court are not present. Indeed, contrary to the first contention of the employees that their case depends upon a question of law, the issues were resolved in the courts below on the factual questions concerning which provisions of the collective bargaining agreement should be applied under varying circumstances.

The employees' petition reveals that the matter is not one involving conflicting decisions among the various courts nor any important question of federal law which should be settled by the Court. Instead, the case involves merely a series of transactions among various corporations beginning with a discrete, separate, independent, and self-sustaining transaction which the district court and the appeals court found to constitute a "buy-out" with the resulting disposition of the seniority of the employees vis-a-vis their fellow employees. While the employees were "end-tailed", thus their seniority rights were affected adversely, they cannot ask this Court to rewrite the contract. In short, they received what was bargained for. Moreover, Local 705 and the employers were faced with adversely affecting seniority rights of one group of Local 705 employees or the other no matter which position they took. *See Humphrey v Moore*, 375 US 335 (1964).

It is noteworthy that the question presented for review asks whether "the ultimate purpose of nominally independent corporations to join under a common roof can be considered." In the first place, the question presented to the Court seems to be whether amidst various corporate activities involving employer judgements, that there comes a time that an "ultimate" decision is made to pursue a certain course of conduct, and federal law should be enunciated by this Court that the last decision retroactively applies, dramatically colors, and forever changes the character and purpose of the events which went before it.

While there may be some justification for consluding that the first step affects all that comes after, no purpose would be served by having this Court consider whether the ultimate and last act changes the character of preceding steps in a series of independent corporate transactions and acquisitions.

Perhaps more importantly, to the extent that the employees ask this Court to decide whether the ultimate purpose of the actors should be considered in determining the applicable contract provisions or the consequences of resulting changes in relevant seniority, the factor was considered by both of the courts below. The decision of the Honorable Frank J. McGarr, whose opinion was stated orally at the conclusion of nearly three days of trial on the merits, contains a recitation of the employees' arguments concerning the allegation that the employers attempted by a total long-term series of corporate maneuvers to interfere with the rights of these employees (App.B.,p.11a). Because the district court felt that the possibility existed that the theory warranted consideration, it, as the record throughout reflects, "gave the Plaintiffs a great deal of latitude in presenting their case and in developing any aspect of that theory that they thought was appropriate" (App.A.,p.lla). After detailed recitation of the position of the employees and the facts of record, the district court concluded on the evidence that the "ultimate" transaction, the consolidation of All-American with Terminal Transport, was not germane because it was "a situation with a different consequence of different sections of the contract" (App.A.,p.12a). The district court, therefore, as the employees would have this Court do, did consider all of the transactions detailed in the record and held that "the end results of hearing all the evidence on that is the inevitable conclusions that it does not help us in deciding the case before the (court)" (App.A.,pp.12a-13a).

Continuing, the court further considered the sum, substance, and significance of the transactions in the light of the employees' theory. The court (ApplB., p. 13a) stated:

> "The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet [sic], unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get

> Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers.

On this very evidence, the opinion contains the plain language that:

> ". . . But the plaintiffs' contention that this reveals that, at the time of the orginal All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive the plaintiffs of their rights is not supported by that document or by any other evidence in the case." (App.B.,p.14a).

Thus, when the employees frame an issue presented for review whether in connection with the allocation of seniority, the ultimate purpose of nominally independent corporations to join under a common roof can be considered, they fail to recognize that their contention was considered but was rejected. Continuing, the district court said:

> "Whether or not this was a long-range plan may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet [sic] transaction--the buy-out of Mid-Continent by All-American." (App.B.,p.14a).

The district court simply concluded that the evidence demonstrated that subsequent transactions were not relevent to the issue of the applicability of the several seniority provisions and that the unique and discrete transaction in which All-American bought out Mid-Continent was implemented in conformity with the appropriate contractual obligations.

Subsequently, the appeals court agreed with the lower court's determination "on the merits of the question" that the transaction in which All-American acquired Mid-Continent was distinct from the latter corporate transaction and that its rejection of the employees' claim that this transaction was part of a scheme designed to interfere with their seniority rights resulted in factual determinations by the lower court which were not "clearly erroneous". The appellate court considered the conspiracy claims to be unsupported, leaving "little to challenge the employers' application of the contract" (App.C.,p.29a), and, after examining

in detail each corporate transacation, found the critical transactions to be quite different one from another. There is no doubt that the courts below did indeed consider the employees' allegations concerning the "ultimate" purpose, and on the facts, the allegations were rejected. No purpose would be serving by having this Court decide a question which has been thoroughly considered by the lower courts.

The employees have taken one sentence of the district court's opinion concerning relevancy out of context. That is insufficient predicate for the exercise of this Court's discretion.

CONCLUSION

WHEREFORE, Respondents respectfully request that the petition be denied.

Respectfully submitted,

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